

**THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT**

In Re: Manchester Roofing Company, Inc. v. Berkley Net

18-044-AP

PROPOSED DECISION AND ORDER

I. Introduction and Proposed Ruling.

Manchester Roofing Company, Inc. (“Manchester Roofing”) appeals from a decision of the New Hampshire Workers’ Compensation Classification and Ratings Appeals Board (“Board”). On August 7, 2018, the Board found and ruled that the proper classification for Kathy Peppers, principal of Manchester Roofing, was NCCI Scopes Manual Code 5551 (“Code 5551”) with respect to policies WC288300334705 (5/25/2015-5/25/16) and WC288300334706 (5/25/2016-5/15/2017). Manchester Roofing asserts that the Board erred and the code should be NCCI Scopes Manual Code 8742 (“Code 8742”).

A merits hearing was held on October 30, 2018. At the conclusion of the hearing, the record was left open to permit each side the opportunity to file written submissions and rebuttals. To that end, the parties were each given ten business days to submit an initial memorandum and/or findings and rulings and then five business days to file rebuttals. Thus, the record closed on November 20, 2018. All timely filed materials were considered in rendering this proposed decision which was required under Ins. 204.26 (a)(1) to be delivered to the Commissioner no later than December 26, 2018.

After considering the record, the hearings officer finds and rules that Manchester Roofing has met its burden of proof under Ins. 204.05 by showing by a preponderance of the evidence that Ms. Peppers classification code during the relevant period should have been Code 8742. Thus, the Board’s August 7, 2018 ruling is **REVERSED**.

II. Facts.¹

A. Kathy Peppers' Testimony.

Kathy Peppers testified that she is the owner and president of Manchester Roofing, a seasonal roofing company that runs for approximately eight months out of the year. She became president of the company on December 10, 2010 upon the passing of her husband who had been the prior president. Manchester Roofing's business model is to act in a sales and administrative role and subcontract the actual roofing work to subcontractors.

As to Ms. Peppers' classifications since becoming president of the company, Ms. Peppers testified that in December of 2010 she was initially classified under the NCCI Scopes Manual Code 8810 (Code 8810) as clerical as she had been in the background at that time doing accounting, taking calls, coordinating crews, and estimating. She retained Code 8810 for a couple of years. In 2012, she was reclassified by Berkley Net to Code 8742 as an outside salesperson as she was "driving around." Manchester Roofing did not dispute this reclassification. For the next approximately four-year period, Ms. Peppers was classified under Code 8742 and was subject to yearly Berkley Net audits. In 2016, Berkley Net changed Ms. Peppers NCCI Scopes Manual Code to Code 7380 (Code 7380) drivers and chauffeur. Manchester Roofing disputed that Code 7380 was applicable and the code was changed back to Code 8742 in August of 2016.

On June 15, 2017, Berkley Net audited Manchester Roofing. The audit provides that Ms. Peppers does estimating, sales, orders materials, makes dump runs and bookkeeping. Ms. Peppers class code remained as Code 8742.

On about June 29, 2017, Ms. Peppers went to a jobsite to look at a roof. While using a ladder owned by Manchester Roofing, Ms. Peppers "surfed" with the ladder down to the ground. The fall resulted in a broken foot. Ms. Peppers

¹ References to documents are references to Manchester Roofing's exhibits which were submitted by way of letter dated October 18, 2018. The video and audio recordings were reviewed and are part of the record.

had been at this particular jobsite once a day or less. She explained that it was “once a day or less” because she had a “super” on the job. She further explained that she visits job sites approximately once per day.

After the fall, Berkley Net had NEIS, Inc. complete a loss report which provides as to Business Operations as follows:

The inspector spoke with the insured who explained that she is the owner of Manchester roofing company. She indicated that she has been in business for 27 years as a roofing company. She stated that she is not involved in any way other than to sell the service. She explained that the way she operates is that she has a service the [sic] responds to calls to Manchester Roofing who forward the calls to her. She then contacts [sic] the prospective clients and obtains the details of what service they do. She stated that she uses eagle view service that provides measurements for the roofs which allows her to determine the material and labor costs. She then provides the customer with an estimate o [sic] the job. If the customer decides to proceed with the job, she then subcontracts a roofing company and orders the materials. The insured indicated that 95% of her work is on residential properties and that none of the work is above a second story and she uses shingles on 98% of the jobs. Her most recent sales totaled \$550,000 and her earnings after expenses was \$114,000.

Ms. Peppers testified that, subsequent to her fall, Berkley Net took the June 15, 2017 audit and simply crossed out Code 8742 with a stamp that reads “ROOFING, WAS INJURED WHILE ON A ROOF PER RECENT CLAIM 5551.” Ms. Peppers then received a bill for approximately \$30,000.

On September 6, 2017, Ms. Peppers wrote a letter explaining that she was not engaged in roofing activities and, as such, should not be classified as Code 5551. The letter did not result in a change from Code 5551 back to 8742. Ms. Peppers testified that no follow-up action was taken by Berkley Net as a result of the letter.

However, Berkley Net did conduct surveillance on Ms. Peppers activities at a Manchester Roofing job that occurred in December 2017 after the code change was made. At that time, Manchester Roofing was working on a roof at the Brown School for the Manchester Housing Authority. Ms. Peppers testified that Manchester Roofing was required as part of the job to do a final inspection of the

roof with Manchester Housing Authority. The inspection occurred on December 4 or 5 of 2017 with Ms. Peppers and a representative of the Manchester Housing Authority. To accomplish the inspection Manchester Housing Authority representative and Ms. Peppers were lifted onto a flat roof that Manchester Roofing had not worked on to observe the work that Manchester Roofing had performed on another roof. Ms. Peppers and the Manchester Housing Authority representative were then lifted back to the ground.

Ms. Peppers testified that she is on a roof approximately sixteen times year. She does not perform roofing activities while on roofs. Rather, she only performs the tasks of preparing estimates and conducting inspections of work performed by subcontractors.

Ms. Peppers also testified as to the issue of “dump runs” to expand on her June 15, 2017 audit statement that she does “dump runs.” She testified that shingles and debris are put into dumpsters on a jobsite which is a per pound cost to the customer. Ms. Peppers does not put roof debris into the dumpsters nor take the dumpsters to the dump. Rather, there is occasionally a roof with a ten-pound direct TV type satellite dish on it. Satellite dishes are put next to the street to see if a scrapper will pick it up. If it is not picked up, Ms. Peppers would bring it with her household trash to the Bedford dump. Ms. Peppers does not do this on a weekly or monthly basis. It is an infrequent occurrence.

Ms. Peppers also testified on cross-examination to a surveillance video that was played at the hearing that showed some of Ms. Peppers’ activities at the Manchester Housing Authority jobsite. In addition to Ms. Peppers’ direct examination about her activities at the jobsite, the video shows Ms. Peppers picking up some paper that was blowing around and unloading a small box out of her truck. Ms. Peppers lastly testified on cross-examination as to a radio show that she was on that was played into the record. The interview occurred in 2013 or 2014. Manchester Roofing had become a sponsor of a radio station show. The host and Ms. Peppers joked in the audio about how things were going and then talked about Ms. Peppers having a female owned business. She stated in the audio that she does the estimates and the inspections. She then stated that every

once and a while she had to get up there and show them how to do it. The host of the show chuckled and then made a joke about how women in the audience would go “yep always have to show them how to do it.” She also stated her credentials as to the roofing industry in the audio which is being a master shingle applicator.

B. James Harrison Testimony.

Mr. Harrison testified for Manchester Roofing. Mr. Harrison has an undergraduate degree from the University of New Hampshire, went into the service, and ultimately obtained an MBA. Mr. Harrison has thirty-five years of experience in insurance and bonding and insurance for construction projects. He provided the bonds for the above-mentioned Manchester Housing Authority roof project. He testified to having general experience bonding Manchester Roofing. He then explained that Ms. Peppers had to go onto the roof for the Manchester Housing Authority in order to obtain final payment.

Mr. Harrison testified that he goes on roofs in his insurance and bonding capacity. He testified that he is not classified as Code 5551. Mr. Harrison also testified that attorneys who have construction defect practices go on roofs without be reclassified as Code 5551. Mr. Harrison testified that as of the date of his testimony he had three roofing clients with estimators and that all of the estimators are classified under Code 8742. Mr. Harrison opined that Ms. Peppers should be classified as Code 8742 based upon his experience.

Mr. Harrison testified on cross-examination that Cross Insurance does not administer the assigned risk market. He testified that less than one percent of this clients are in the assigned risk market.

C. Stephanie Hyser.

Ms. Hyser testified for Berkley Net and is an underwriting director at Berkley Net. Ms. Hyser took an active role in the Berkley Net decision to move Ms. Peppers’ code from Code 8742 to Code 5551. In making the decision, Ms. Hyser testified that Berkley Net looked at the policy history, business plan, websites, loss control surveys, and prior audits. Ms. Hyser then looked at the Scopes Manual and the Basic Manual to determine the which code should apply.

Ms. Hyser testified that Code 8742 is for outside sales and that many things can fall within it but is very specific about what you can and cannot do within the code. She testified that Code 8742 would not be appropriate for an active jobsite. She testified that Code 8742 would only be appropriate prior to a jobsite becoming active. She went on to testify that if a person is on a jobsite while the jobsite is active, they are then subjecting themselves to the risk of that jobsite simply by virtue of being on the jobsite while it is active. She then opined that the person should then be classified the highest risk at that jobsite. She then gave the example of a roofing jobsite and the salesperson subjecting themselves to the risk of roofing. Thus, regardless of the actual activity of the salesperson, the sales person would then properly be classified as a roofer under Code 5551.

Ms. Hyser's supported her opinion by way of reference to Code 8742's special conditions which provides, in relevant part, as follows:

When outside salespersons or collectors regularly and frequently perform duties at the premises of their employers, their total payroll is assigned to the highest rated classification representing any part of their work.

However, in further questioning by the undersigned about the actual language of the special conditions provision, Ms. Hyser testified that it is in fact the employee's work at the jobsite, as opposed to mere presence on the jobsite, that controls under Code 8742 because the special condition section states "their work" which refers to the employee's work. Ms. Hyser then agreed that the issue of whether Code 8742's special condition moves a person from Code 8742 to Code 5551 is actually decided by looking at the employee's work at the jobsite and determining if that work falls within Code 5551.

III. Substantive Legal Standard and Rule Provisions.

A. Burdens.

Under Ins. 204.05, the party asserting a proposition shall bear the burden of proving the truth of the proposition by a preponderance of the evidence. *Id.* at (f). For purposes of this section, “proof by a preponderance of the evidence” means “what is sought to be proved is more probable than not.” *Id.* at (a). The assertion at issue is Manchester Roofing’s assertion that the Board incorrectly ruled that Code 5551 applied to Ms. Pepper’s work and not Code 8742.

A. The Codes.

The gravamen of this case is whether Ms. Peppers’ work is properly coded under NCCI Scopes Manual Code 8742 or NCCI Scopes Manual Code 8551.

1. NCCI Scopes Manual Code 8742.

The NCCI Scopes Manual describes Code 8742 as follows:

Code 8742 is applied to outside salespersons or collectors. Since these employees are common to many businesses they are considered to be Standard Exceptions. As such, they are classified to Code 8742 unless the classification applicable to their employment includes salespersons. Under the latter circumstance the outside salesperson or collectors are assigned to the classification that includes salesperson, not Code 8742.

Salesperson or collectors as defined in the *Basic Manual* are employees engaged in such duties away from the employer’s premises. Code 8742 is not available for employees who deliver merchandise. These employees are assigned to the driver’s classification applicable to the risk even though these employees also collect or sell. If they deliver merchandise by walking to or using public transportation, they are assigned to the governing classification. Judgement is necessary in assessing these employees’ duties for classification purposes since occasional courtesy deliveries of a nominal quantity would not preclude them from being in classified to Code 8742.

The Special Conditions section of Code 8742 provides as follows:

When outside salespersons or collectors regularly and frequently perform duties at the premises of their employers, their total payroll is assigned to the highest rated classification representing any part of their work. This is in accordance with the Basic Manual. Again, judgment is required because outside employees will normally spend

some time at the premises of their employers attending sales meetings, telephoning clients for appointments, turning in collections, and making out reports or occasionally performing emergency inside work, all of which are included in the scope of Code 8742.

2. NCCI Scopes Manual Code 5551.

The NCCI Scopes Manual states that Code 5551 “[a]pplies to the installation of new roofs and the repair of existing roofs. Includes the installation and/or repair of joists, trusses, rafters, roof decks, sheathing, and all types of roofing materials. The description goes on to describe Code 5551 as follows:

Code 5551 applies to all kinds of roofing activities including work on roofs that are flat, sloped or built-up. Types of materials used in the roofing process include hot tar, hot or cold composition material including polyurethane foams or resins and concrete aggregates, metal, shingle, slate, tile or paper. The inclusion of all kinds of roofing under Code 5551 is based on the conclusion that roofing companies generally perform various kinds of roofing using their labor crews interchangeably.

The Code applies to new roof installments as well as to the repair of roofs and includes drivers. As Code 5551 excludes yard or storage facility employees, Code 8227 is available for division or payroll for roofers who maintain a permanent yard.

This classification also applies to pressure washing of roofs to remove moss, mildew, or debris, and to the incidental replacement of worn or damaged roofing materials. This procedure usually involves the use of a vehicle equipped with a tank (to hold water) and a small engine to generate higher pressure. The tank is filled with water, and the engine generates high pressure. Operators start at the peak of the roof and direct the nozzle spray slightly in front of their feet. As the roof is cleaned, roofing material is replaced. After the roof has completely dried, a preservative (or anti-moss) treatment is generally applied from a hand-held, self-contained sprayer of the tow to five gallon variety-similar to the type used to spray flowers or shrubs.

IV. Analysis.

The parties are in agreement that the two codes at issue are Code 8742 and Code 5551. The Department’s role, as such, is to apply the language of the codes to the facts of the case to see whether Manchester Roofing has met its burden of showing that the Board erred in applying Code 5551 to Ms. Peppers’ work. The Department found all the witnesses who testified to be truthful in their testimony.

As a threshold matter, the Department notes, as detailed above, that Berkley Net took the position at the hearing that Code 8742 did not apply to Ms. Peppers work because its application ceased when the roofing project began and then anyone on the jobsite after that point was properly classified as Code 5551 because the jobsite was a roofing jobsite. The Department is not persuaded by Berkley Net's analysis as it is inconsistent with the language of both codes that were relied upon by the parties. It is too broad and would catch risks that should not be classified as roofing risks.

Code 8742's special condition language indicates that if an outside salesperson regularly performs duties at his/her employer's premises, the employee is then assigned the highest rated classification representing any part of his/her work. Reading the rule as a whole, the special condition language addressed the distinction between an outside sales person and a person who is working inside the employer's premises as in the employer's headquarters.

The Department is not convinced that a construction jobsite qualifies as the employer's premises under Code 8742. Thus, the use of the special condition is inappropriate on that ground. However, even if a jobsite is in fact the employer's premises based upon a control type argument, the special condition would still not apply in this case.

The Department does find that Ms. Peppers is at jobsites regularly and frequently. But this only means that one needs to look at what Ms. Peppers is doing at the jobsites to determine if Code 8742 or Code 5551 is appropriate based upon her work at the jobsite. There is no other higher class code at issue.

As to Ms. Peppers work at jobsites, the Department finds that it would be expected that an outside sales person would be at jobsites regularly and frequently while estimating, making the sales, hiring subcontractors, purchasing materials and inspecting the subcontractor work. None of these duties would be a basis to move Ms. Peppers from Code 8742 to Code 5551 as they are not the acts of a roofer. The Department does not agree that an outside salesperson on a small or large construction project would simply make a sale prior to the work starting and

then have no contact with the job itself as part of the customer service part of a sale of a service.

Berkley Net also supports its Code 5551 decision by the radio interview where Ms. Peppers stated that she shows the employees [subcontractors really] how to do it. The Department finds that the interview is nothing more than light hearted banter in an informal setting. It is not sufficient to demonstrate that Ms. Peppers was actually engaged in roofing while at any jobsite. And, as she has a role of inspecting the product she is selling to the customer, it would not be surprising if she had opinions to share about the quality of the subcontractor's work. The other acts pointed to by Berkley Net to support Code 5551 are also unconvincing. The infrequent picking up of paper Ms. Peppers observes blowing at a jobsite nor the infrequently delivering of materials nor the occasionally taking a ten-pound satellite dish home to dispose of are the risk of roofing. A salesperson or anyone else working for an employer might do these acts. The Department declines to equate any of these acts as qualifying as the risk of roofing under Code 5551. Code 5551 is written in terms of active roofing right down to the detailed way a roofer would pressure wash a roof. It is not meant for executives and others who are on a jobsite for other purposes separate from actively engaging in roofing.²

V. Conclusion.

In view of the above, the Board's decision is **REVERSED**. Ms. Peppers shall receive Code 8742 for the applicable period.

SO ORDERED

Dated: December 18, 2018



James Fox, Presiding Officer

² Though not the specific basis of this decision, the Department is also concerned that such an application of codes would raise fundamental concerns in regard to whether the rate charged matches the risk insured which would in turn give rise to multiple regulatory issues.